IN THE MISSOURI SUPREME COURT

JANET SUE MITCHELL and ROY G. MITCHELL,	)	
Plaintiffs/Appellants,	)	
vs.	)	**Supreme Court No. SC84936**
SCHNUCK MARKETS, INC.,	)	
Defendant/Respondent.	)	

On Appeal from the Circuit Court of the City of St. Louis, Missouri
Honorable Julian L. Bush
and
Court of Appeals, Eastern District

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This is a negligence action wherein Appellants alleged Appellant Janet Mitchell tripped on an uneven seam between the sidewalk of the entrance to Respondent's store and the parking lot. Appellants have appealed, asserting that the trial court erred in permitting Respondent to elicit testimony from an employee-witness when Respondent had disclosed the identity of the witness, along with the fact that the witness had a conversation with Appellant Janet Mitchell immediately after her injury, approximately eighteen months before trial, asserting surprise and prejudice. The Court of Appeals for the Eastern District of Missouri affirmed the trial court's judgment. This Court sustained Appellants' Application for Transfer on December 24, 2002.

STATEMENT OF FACTS

Respondent Schnuck's ("Schnuck's) operates a store at 1160 Shackelford in Florissant, Missouri. (Tr. 62) Appellant Janet Mitchell ("Mitchell") went to that Schnuck's location on November 7, 1997. (Tr. 13) Mitchell went to that Schnuck's store approximately once every couple of weeks, as it was close to where she lived. (Tr. 13-15) She parked her car right across from the entrance on the north end of the store. (Tr. 16) Mitchell testified that as she approached the entrance, she tripped on the seam between the parking lot and the sidewalk. (Tr. 18-20) Mitchell had walked that exact path on prior occasions. (Tr. 39)

Schnuck's employee Donna Wahoff ("Wahoff") testified that after she saw Mitchell coming through the door, she asked her what happened and if she should call for emergency help or for someone from Mitchell's home. (Tr. 64-65) Wahoff also testified that Mitchell told her she didn't trip, she fell. (Tr. 64) Mitchell denied that she said that to Wahoff. (Tr. 46) The conversation was very brief. (Tr. 64-65)

Prior to that evening, Mitchell had never complained about the seam and stated there was nothing concealing it as she approached the store. (Tr. 41) Mitchell testified at trial that the seam was between one to two inches higher than the

surface of the asphalt parking lot. (Tr. 19-20) Mitchell testified at her deposition that the seam was "maybe an inch." (Tr. 44-45) Wahoff, who has worked at that particular store for six years, testified that the seam was about a quarter inch. (Tr. 62, 70)

Appellants filed their Petition in this matter in 1999. (L.F. 1) Pursuant to the litigation, Appellants sent form interrogatories to Respondent. (L.F. 8-15). Interrogatory No. 2 and Respondent's response thereto were as follows:

2. STATEMENTS

State whether or not, following the date of the occurrence mentioned in the Petition in this case, a statement, interview, or report, or a stenographic, mechanical, electrical, audio, video, motion picture, photograph, or other recording, or transcription thereof, of the Plaintiff, or of a statement made by the Plaintiff and contemporaneously recorded, has been secured from Plaintiff or taken of Plaintiff; and, if so, state the following:

(a) Date, place and time taken;

(b) Name and addresses of the person or person connected with taking it;

(c) Names and addresses of all persons present at the time it was taken;

(d) Whether the statement was oral, written, shorthand, recorded, taped, etc.;

(e) Was it signed?

(f) Names and addresses of the persons or organizations under whose direction and upon whose behalf it was taken or made; and

(g) Please attach an exact copy of the original of said statement, interview, report, file, or tape to your answers to these interrogatories; if oral, please state verbatim the contents thereof.

ANSWER: No such statement has been taken from Plaintiff. Plaintiff did have a short conversation with Defendant's employee Donna Wahoff immediately after her injury. That conversation was not recorded.

In addition, Appellants also submitted a document request. Appellants' Document Request No. 8 and Respondent's response thereto is as follows:

8. Any and all statements, interviews, or reports, or a stenographic, mechanical, electrical, audio, video, motion picture, photograph or other records, or transcription thereof, of the Plaintiffs, or of a statement made by Plaintiffs and contemporaneously recorded, that has been secured from Plaintiffs or taken of Plaintiffs.

RESPONSE: None.

(L.F. 16-18) Respondent filed both of these responses on November 15, 1999, approximately eighteen months before trial. (L.F. 8-18) Respondent's counsel also sent via telecopy a copy of the incident report to Appellants' counsel prior to Appellants' depositions. (Tr. 54, L.F. 19)

The parties tried this cause of action to a jury on June 26 and 27, 2001. (Tr. 2) The parties made their opening statements on June 26, 2001. (Tr. 3-12) Respondent's counsel stated in his opening statement that Wahoff would testify that Mitchell told her she did not trip, she fell. (Tr. 11) On the second day of trial, Appellants' counsel objected to Wahoff testifying to that remark because

Respondent had not disclosed it in response to Interrogatory 2. (Tr. 52-53) The trial court ruled as follows:

"Arguably the answer is incomplete because arguably the conversation between Plaintiff and Donna Wahoff was a statement. And the interrogatory asked, among other things, for a verbatim statement – a verbatim account of the contents of the statement and that was not provided, but it was conspicuous, it was not provided.

You know, the interrogatory answer did recount the fact that there was a conversation, and very plainly, there was not a verbatim account given in the interrogatory answer to the interrogatory. The motion for sanctions could have been filed way back in November of 1999. And it wasn't. I think under the circumstances it would be an unfair sanction to forbid the witness from giving the testimony described.

However, before she would be allowed to testify, the plaintiff has the right to conduct an interview of her or even a deposition if the Plaintiff would choose to do so." (Tr. 56)

After the Court's ruling, Appellants' counsel chose to interview Wahoff. (Tr. 57) After the interview, Appellants' counsel advised the Court he was familiar with what

Wahoff would testify to regarding the remarks made by Mitchell at the scene of the fall. (Tr. 58)

The jury found in favor of the Respondent and the trial court entered judgment on the jury's verdict on June 27, 2001. (L.F. 22) The trial court denied Appellants' Motion for New Trial on September 21, 2001. (L.F. 35) The Court of Appeals affirmed the trial court's judgment on September 17, 2002.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR NEW TRIAL BECAUSE RESPONDENT FULLY RESPONDED TO APPELLANTS' INTERROGATORY.

Delisle v. Cape Mutual Insurance Company, 675 S.W.2d 97 (Mo. Ct. App. 1984)

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT PROPERLY ADDRESSED ANY DISCOVERY AMBIGUITY BY PERMITTING APPELLANTS' COUNSEL TO EITHER DEPOSE OR INTERVIEW DONNA WAHOFF.

Connelly v. Schafer, 837 S.W.2d 344 (Mo. Ct. App. 1992)

State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. banc 1988)

One Thousand Bates Redevelopment Corp. v. *Guelker*, 883 S.W.2d 103 (Mo. Ct. App. 1994)

Gassen v. Woy, 785 S.W.2d 601 (Mo. Ct. App. 1990).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR NEW TRIAL BECAUSE RESPONDENT FULLY RESPONDED TO APPELLANTS' INTERROGATORY.

Respondent properly answered Appellants' Interrogatory 2 (hereinafter the "interrogatory") as the evidence showed that the conversation at issue took place on the date of the occurrence mentioned in the Petition and the evidence showed neither Respondent nor anyone else took or secured a statement from Mitchell, but rather Mitchell had a short conversation with Wahoff, just as Respondent disclosed in its response. The interrogatory provides in pertinent part:

2. STATEMENTS

State whether or not, **following the date of the occurrence mentioned in the Petition in this case**, a statement, interview, or report, or a stenographic, mechanical, electrical, audio, video, motion picture, photograph, or other recording, or transcription thereof, of the Plaintiff, or of a statement made by the Plaintiff and contemporaneously recorded, **has been secured from Plaintiff or taken of Plaintiff;** and, if so, state the following:

(a) Date, place and time taken;

(b) Name and addresses of the person or person connected with taking it;

(c) Names and addresses of all persons present at the time it was taken;

(d) Whether the statement was oral, written, shorthand, recorded, taped, etc.;

(e) Was it signed?

(f) Names and addresses of the persons or organizations under whose direction and upon whose behalf it was taken or made; and

(g) Please attach an exact copy of the original of said statement, interview, report, file, or tape to your answers to these interrogatories; if oral, please state verbatim the contents thereof.

(L.F. 8-9)(Emphasis added). Thus, in order for a communication to fall within the scope of this interrogatory, it must meet two requirements. First, it must have taken

place following the date of the occurrence mentioned in the Petition. Second, the communication must have been "secured from" or "taken of" the Plaintiff. *Id.*

Wahoff's conversation with Mitchell does not meet either requirement. First, simply stated, the conversation took place on the date of the occurrence and not following the date of the occurrence. (Tr. 13, 64-65) Consequently, by the plain terms of the interrogatory, it did not require disclosure of the conversation. (L.F. 8-9)

Moreover, the interrogatory did not seek "any statements made by Plaintiff", an essential plank of Appellants' argument. Rather, the interrogatory sought any statements taken of or secured from Appellants. *Id.* The terms "taken of" or "secured from" add an element of formality to the interrogatory that is neither supported by the evidence nor addressed by Appellants' argument. *See e.g.*, *American Heritage Desk Dictionary* 943 (1981) ("Take" means to "obtain through certain procedures").

Wahoff testified that after she saw Mitchell coming through the door, she asked her what happened and if she should call for emergency help or for someone from Mitchell's home. (Tr. 64-65) The conversation was very brief. *Id.* Ms. Wahoff did not record the conversation in any manner. (L.F. 8) Thus, this

short, unrecorded discourse did not constitute the "taking or securing of a statement" as those terms are understood. *American Heritage Desk Dictionary* 943 (1981). Consequently, Respondent's interrogatory response, namely that "No such statement has been taken from Plaintiff. Plaintiff did have a short conversation with Defendant's employee, Donna Wahoff, immediately after her injury. That conversation was not recorded." was accurate and complete. *Id.;* (L.F. 9) Simply stated, Appellants' argument relies on a reading of the interrogatory that reads the terms "taken of" or "secured from" out of the interrogatory. *Id.* This Court should not accept Appellants' attenuated reading of the interrogatory.

The language of the interrogatory requiring such statements to be taken <u>following the date of the occurrence</u> further supports this conclusion. That temporal requirement shows that the interrogatory was designed to obtain formal statements obtained by investigators, insurance adjustors and the like. It simply was not meant to obtain the sort of conversations that occurred here. (L.F. 8-9) Similarly, the verbatim requirement in subpart (g) also suggests that the interrogatory seeks formal, structured statements unlike the short conversation at issue here. (L.F. 8-9) Accordingly, Respondent did not commit a discovery violation and this Court should affirm the trial court's judgment on that basis.

Moreover, Appellants' conduct during the litigation shows their agreement with Respondent's reading of the interrogatory. Respondent filed its discovery responses on November 15, 1999. (L.F. 15) The parties tried the case in late June, 2001. (Tr. 2) If Appellants truly believed that a short conversation occurring on the date of the occurrence constitutes the taking of or securing of a statement following the date of the occurrence, they had approximately 18 months to file a motion to compel in order to obtain a more complete answer. (L.F. 15, Tr. 2) Appellants did not do so. Appellants' inaction, in fact, signifies agreement with Respondent's interpretation. Consequently, Appellants cannot complain that Respondent did not answer the interrogatory completely. *See, Delisle v. Cape Mutual Insurance Company*, 675 S.W.2d 97, 104 (Mo. Ct. App. 1984)(Permitting testimony by Plaintiff's undisclosed witness where Plaintiff's interrogatory response seemed responsive and Defendant did not seek a more specific answer).

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT PROPERLY ADDRESSED ANY DISCOVERY AMBIGUITY BY PERMITTING APPELLANTS' COUNSEL TO EITHER DEPOSE OR INTERVIEW DONNA WAHOFF.

Trial courts in Missouri have broad discretion in dealing with discovery disputes, and reversal only occurs where this Court finds an abuse of that broad discretion. *Connelly v. Schafer*, 837 S.W.2d 344, 350 (Mo. Ct. App. 1992). Moreover, a trial court only abuses its discretion when its ruling "is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of consideration." *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988); *Connelly v. Schafer*, 837 S.W.2d 344, 350 (Mo. Ct. App. 1992). In the instant case, the trial court did not rule any discovery

violation occurred[1], but rather in an abundance of caution, and after careful consideration, permitted Appellants to interview or depose Wahoff. (Tr. 56) Appellants chose the former course. Given the fact that Appellants essentially complained regarding one sentence of testimony (Tr. 52-53), the trial court's

[1] The Trial Court stated "Arguably the answer is incomplete because arguably the conversation between Plaintiff and Donna Wahoff was a statement. And the interrogatory asked, among other things, for a verbatim statement – a verbatim account of the contents of the statement and that was not provided, but it was conspicuous, it was not provided.

You know, the interrogatory answer did recount the fact that there was a conversation, and very plainly, there was not a verbatim account given in the interrogatory answer to the interrogatory. The motion for sanctions could have been filed way back in November of 1999. And it wasn't. I think under the circumstances it would be an unfair sanction to forbid the witness from giving the testimony described.

However, before she would be allowed to testify, the plaintiff has the right to conduct an interview of her or even a deposition if the Plaintiff would choose to do so. (Tr. 56)

caution in permitting an interview or deposition eliminated any chance of prejudice to Appellants as they were fully prepared to cross-examine Wahoff. (Tr. 58) Furthermore, while Appellants complain in their brief about the limitations imposed by a "two minute" interview, the length of the interview was Appellants' counsel's choice. The trial court granted Appellants the right to interview Wahoff, with absolutely no time limitations, or to depose her. If Appellants' counsel chose to conduct a brief interview, that was his own choice and it cannot provide the basis for reversing the trial court's careful ruling. *Id.* Accordingly, the trial court's ruling is completely unassailable and certainly cannot be construed "to shock the sense of justice and indicate a lack of consideration". *Id.; See also, One Thousand Bates Redevelopment Corp.* v. *Guelker*, 883 S.W.2d 103 (Mo. Ct. App. 1994); *Gassen v. Woy*, 785 S.W.2d 601 (Mo. Ct. App. 1990).

The *One Thousand Bates Redevelopment Corp*. and *Gassen* cases are particularly instructive. In *One Thousand Bates Redevelopment Corp.*, 883 S.W.2d at 103, the Plaintiff landowner argued that the trial court erred in permitting the defendant condemnor to present the testimony of three witnesses it had disclosed three days before trial. *Id.* at 105. The landowner argued on the second day of trial that he was subjected to surprise and prejudice because he was denied a

fair opportunity to confront them by taking their depositions. *Id.* The Court of Appeals affirmed the decision of the trial court because the trial court offered the landowner the chance to interview the witnesses, a course which it found reasonable, especially in light of the fact that the landowner had not raised the issue until the second day of trial. *Id.* at 105-106.

One Thousand Bates Redevelopment Corp. governs the instant matter. There, as here, the trial court did not make any finding of a discovery violation. (Tr. 56) There, as here, the trial court permitted the complaining party to interview the witnesses at issue in order to address the complaining party's concerns. *Id.* There, as here, the complaining party did not raise the issue until the second day of trial. (Tr. 52-53) Moreover, in the instant case, the trial court offered Appellants the chance to interview or depose Wahoff. (Tr. 56) Appellants chose the former course. (Tr. 57) In addition, Appellants in the instant case were aware that Appellant Janet Mitchell had spoken with Wahoff at the scene of her fall approximately 18 months before trial. (L.F. 15) Accordingly, the trial court in the instant case properly used its broad discretion in the instant matter. *Id.*

In *Gassen*, 785 S.W.2d at 601, the Court of Appeals found that the defendant in a medical malpractice case had violated rule 56.01(b)(4) by not

disclosing that his expert would be testifying regarding an x-ray report he had not viewed at the time of his deposition. *Id.* at 604. Nonetheless, the Court affirmed the decision of the trial court permitting the expert to testify because the trial court permitted the Plaintiff to interview the doctor prior to trial and there was no showing that the opportunity to interview the witness would not remedy the non-disclosure. *Id.* at 604. Similarly, in the instant case, Appellants have made no showing that the trial court's allowing them to interview or depose Wahoff did not completely allay their discovery concerns. Rather, Appellants assert that "Because [Wahoff's] testimony called directly into question the credibility of the Plaintiff as to the critical facts of the case, it was prejudicial". *App. Br. p. 14.*

This assertion displays a complete misunderstanding of what prejudice is at issue. Appellant has simply asserted the prejudice to his case from Wahoff's testimony regarding her conversation with Janet Mitchell. However, what is at issue in the instant appeal is the prejudice, if any, from the trial court's decision to allow Appellants to interview or depose Wahoff. Given Appellants' counsel's interview of Wahoff (Tr. 57-58), and Appellants' counsel's recitation on the record that he knew what Wahoff would testify to (Tr. 58), Appellants have simply made no showing that can warrant a new trial. *Gassen*, 785 S.W.2d at 604*; cf., Crompton*

v. Curtis-Toledo, Inc., 661 S.W.2d 645 (Mo. Ct. App. 1983)(New trial granted where trial court did not permit Defendant to interview or take deposition of witness not disclosed in interrogatory answers).

Appellants' reliance on *Fisher v. Waste Management of Missouri,* 58 S.W.3d 523 (Mo. banc 2001) is completely misplaced. In *Fisher,* the Court's decision was entirely governed by V.A.M.S. § 287.215, as opposed to the Missouri Rules of Civil Procedure. *Id.* at 524, 527. Furthermore, the *Fisher* court carefully distinguished the statutory mechanism in place from the Missouri Rules of Civil Procedure which include "interrogatories, … and other wide ranging discovery devices." *Id. at 527.* In addition, the statute at issue in *Fisher* offered no discretion to the lower court to admit the statement if it was not disclosed, unlike the broad discretion offered to trial courts under the rules of discovery. V.A.M.S. § 287.215*; Connelly v. Schafer*, 837 S.W.2d 344, (Mo. Ct. App. 1992). Consequently, *Fisher* offers no support for Appellants' position.

Conclusion

For all the foregoing reasons, this Court should affirm the decision of the Court of Appeals and the trial court's order denying Appellants Janet Sue Mitchell and Roy G. Mitchell's Motion for New Trial against Respondent Schnuck Markets, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of January, 2003, I delivered two (2) copies of the foregoing brief accompanied by a disk copy via hand-delivery, to: Joseph L. Walsh, III, Attorney for Appellants, Joseph L. Walsh, P.C., 720 Olive Street, Suite 750, St. Louis, Missouri 63101.

The undersigned certifies that he enclosed to the Clerk and the above-named counsel a 3-1/2 inch computer diskette containing the full text of *Brief of Respondent Schnuck Markets, Inc.* and furthermore certifies that the diskettes have been scanned for viruses with the Norton AntiVirus Corporate Edition Software and to the best of his knowledge and belief they are virus-free.

The undersigned also certifies that the *Brief of Respondent Schnuck Markets, Inc.* complies with the limitations contained in Rule 84.06(b) and contains a total of 3,458 words of monospaced type.